[Title Omitted in Printing]

[Hearing Examiner's] Recommended Decision

Preliminary Statement

[Filed August 17, 1970]

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*), hereinafter called the Act. It was instituted by a complaint filed on May 12, 1969, by the Packers and Stockyards Administration, United States Department of Agriculture. The respondent, operator of a stockyard at Pine Bluff, Arkansas, and registered under the Act to sell livestock on commission, was charged with falsely weighing livestock sold at the stockyard, and failing to keep required records. On June 20, 1969, respondent filed an answer denying the alleged violations and requesting a hearing.

In July 1969, an oral hearing was set for Pine Bluff on October 29, 1969, but on October 16 it was continued to December 16 because of congestion in the hearing calendar in the Office of Hearing Examiners. At respondent's request, this December 16 setting was continued to January 28, 1970, and notice was given later of the location of the hearing room.

The hearing was held in the Federal Building in Pine Bluff, Arkansas, on January 28 and 29, 1970, before Chief Hearing Examiner Jack W. Bain, Office of Hearing Examiners of the Department. James S. Krzyminski and John M. Powell of the Office of the General Counsel of the Department appeared for complainant, and R. A. Eilbott, Jr., and Edward I. Staten, of Reinberger, Eilbott, Smith and Staten, Attorneys at Law, Pine Bluff, appeared for respondent. Complainant respondent presented 11 witnesses and five exhibits. The transcript contains 357 pages.

After the hearing, complainant filed proposed findings and brief on March 11, 1970, (24 pages), respondent filed its answering brief and proposals on June 4 (34 pages), and complainant replied on July 1, 1970 (9 pages).

Proposed Findings of Fact

1. The respondent, Glover Livestock Commission Company, Inc., is a corporation operating a stockyard at Pine

Bluff, Arkansas, posted as a stockyard under the Act, selling livestock on commission at the stockyard, and registered under the Act as a market agency to sell livestock in interstate commerce.

2. By letter dated August 4, 1966, respondent was notified that on June 2, 1964, and July 26, 1966, investigations had disclosed that an employee of respondent had weighed consigned livestock for sale on a weight basis at less than their true weights, and respondent was requested to take action to assure accurate weighing in compliance with the Act and regulations.

3. By a certified letter dated June 26, 1967, respondent was notified that similar short weights had been made by respondent, and respondent was again requested to take corrective action.

4. On February 25, 1969, in the transactions listed below, in selling consigned livestock on a weight basis, respondent intentionally weighed the livestock at less than their true weights, issued scale tickets and accountings to the consignors on the basis of the false weights, and paid the consignors on the basis of the false weights.

No. of Head and Description	Name of Consignor	Sales Weight (Pounds)	Weight Shown Upon Reweighing (Pounds)	Weight Difference (Pounds)
1 Calf	E. E. Silliman	300	305	5
1 Calf	J. A. McFarlin	335	350	15
1 Calf	Bobby Whithead	255	265	10
1 Calf	O. Wolfe	370	380	10
1 Calf	E. Graves	380	390	10
1 Calf	Southwest Cattle Co.	365	370	5
1 Calf	M. N. Williams	365	370	5
1 Calf	Henry Williams	360	365	5
1 Calf	Southwest Cattle Co.	245	255	10

5. Respondent kept, in connection with the above transactions, accounts and records, including scale tickets, accounts of sale, and buyers' bills, which failed to show the true and correct weights for the livestock sold.

Proposed Conclusions

The principal question here is whether the respondent

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Agriculture and the United States, petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Eighth Circuit that reversed the suspension of respondent as a registered market agent.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 454 F. 2d 109. The decision and order of the Judicial Officer of the Department of Agriculture (Appendix B, *infra*) is reported at 30 A.D. 179.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*) was entered on January 26, 1972. On April 18, 1972, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including May 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority as a reviewing court by setting aside the 20-day suspension of a registrant under the Packers and Stockyards Act ordered by the Secretary for a wilful violation of the Act.

STATUTES INVOLVED

The relevant Sections of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, *et seq.*, and the pertinent provisions governing judicial review of orders under that Act, 28 U.S.C. 2341, *et seq.*, are reproduced *infra* in Appendix D.

STATEMENT

Respondent, Glover Livestock Commission Co., Inc. ("Glover") operates a stockyard in Pine Bluff, Arkansas, and is registered under Section 303 of the Packers and Stockyards Act, 7 U.S.C. 203, as a "market agency." Under the Act, Glover is authorized to sell consigned livestock on a commission basis,

and is required to comply with the various provisions of the Act and implementing regulations of the Department of Agriculture.

On three occasions prior to the present controversy (*i.e.*, on June 2, 1964, July 26, 1966 and June 20, 1967), the Department of Agriculture found that Glover had underweighed livestock which it was selling on consignment (App. A, 16). Glover was notified of those findings on August 4, 1966 and again on June 26, 1967 and was requested to institute corrective action to insure accurate weighings at the stockyard (App. A, 16-17).

After an investigation revealed that Glover had again underweighed cattle, the Department instituted the present administrative proceeding to determine whether Glover had violated the Act. After a hearing, the Secretary, acting through the Judicial Officer, found that on February 25, 1969, Glover had underweighed ("short-weighed") nine cattle by a total of 75 pounds and that its "short-weighing" and related acts violated Sections 307(a) and 312(a) of the Act, 7 U.S.C. 208(a) and 213(a), which prohibit unfair and deceptive commercial practices by market agencies [1] (App. B, 28-30, 33). The Judicial Officer

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[1] Section 307(a) declares unlawful "every unjust, unreasonable, or discriminatory regulation or practice" of a market agency. Section 312(a) prohibits engaging "in * * * any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling * * *" of livestock. See App. D, *infra*.

ordered Glover to cease and desist from the violations[3] and, exercising the Secretary's authority under 7 U.S.C. 204 to suspend a registrant "for a reasonable specified period," he suspended Glover's registration under the Act for 20 days (App. B, 34).[4] The Judicial Officer stated (App. B, 33-34):

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than [the 30 days] recommended by the complainant and the hearing examiner.

Since Glover operates its agency only on Tuesdays, the suspension would interrupt its business for at

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[3] The Secretary's order directed Glover to cease and desist from:

> (1) Weighing livestock at other than their true and correct weights;
>
> (2) Issuing scale tickets or accountings on the basis of false and incorrect weights;
>
> (3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and
>
> (4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

The order also directed Glover to maintain records reflecting the true weights of livestock sold by it in a weight basis (App. B, 34).

[4] The hearing examiner had recommended a suspension of 30 days.

most three, and perhaps only two, business days (Gov. App. 27-28).[4]

The court of appeals affirmed, as supported by substantial evidence, the Judicial Officer's findings of violation and sustained the cease-and-desist order (App. A, 21-22). The court, however, reversed the suspension. The court recognized that the Secretary was authorized, under 7 U.S.C. 204, to suspend "any registrant found in violation of the Act," and that the suspension here satisfied the pertinent requirements of the Administrative Procedure Act, 5 U.S.C. 558 (App. A, 22-23). The court stated that "the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of " 'wilfulness' " (App. A, 25). Nonetheless, it held that the suspension was "unconscionable" for two reasons (*ibid.*):

1. Since the "dominant purpose" of suspensions ordered in four prior cases under the Act was "to punish the various respondents for their intentional and flagrant conduct," suspension of Glover (whose acts—albeit wilful—were not "deliberate or flagrant") would not " 'achieve * * * uniformity of sanctions for similar violations' * * * [and is] 'unwarranted and without justification in fact.' "

2. "The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate."

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[4] "Gov. App." refers to the "Respondent's Designation of Appendix" filed in the court of appeals.

REASONS FOR GRANTING THE WRIT

As the court below recognized, the Secretary's order suspending Glover for twenty days was authorized by the Act and was entered in compliance with the applicable requirements of the Administrative Procedure Act. The court's reversal of the brief suspension of Glover (which would affect its business for two or at most three business days) represents a serious departure from the principles established by this Court, and consistently followed by the lower courts, narrowly limiting the scope of judicial review of administrative orders. Moreover, the decision below, if left standing, could significantly impair the effective enforcement of the Packers and Stockyards Act and other similar regulatory statutes.

1. This Court has repeatedly emphasized the limited scope of judicial review of orders of administrative agencies. In *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, the Court stated (at 612-613) that review is permitted "no further than to ascertain whether the Commission made an allowable judgment in its choice of * * * remedy," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist."

This narrow standard of review reflects the "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence'

* * *." *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 112. See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620-621. Thus, an agency's choice of appropriate remedy must stand unless it "is so lacking in reasonableness as to constitute an abuse of its discretion". *American Power Co.* v. *Securities and Exchange Commission*, *supra*, at 115. Indeed, in dealing with the "ancillary features of a valid commission order" the courts cannot overturn the agency's discretionary determination "in the absence of a patent abuse of discretion." *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413, 414; *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 250.

These principles apply with special force in this case. The Secretary is specifically authorized by statute to use suspension as an appropriate remedy and whether to impose that penalty and for how long are questions peculiarly within the Secretary's broad discretion in selecting the appropriate remedy. Other courts of appeals have recognized that if a suspension or revocation is authorized by statute for the particular violation found, they have no authority to consider its appropriateness in the particular case since that is a determination within the discretion of the agency.

In *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, certiorari denied, 359 U.S. 907, the Seventh Circuit, in an *en banc* decision (overruling a decision by a panel) sustained the *revocation* by the Secretary of Agriculture of the registration of a "futures Com-

mission merchant" under the Commodity Exchange Act. The Court held that it had no authority to disturb the Secretary's order of revocation, stating (260 F. 2d at 296):

> It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made *an allowable judgment in its choice of the remedy* and ordinarily the Court of Appeals has no right to change the penalty because the agency might have imposed a different penalty. (Emphasis in the original.)

Similarly in *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606, the Third Circuit sustained an order of the Secretary of Agriculture suspending the licenses of registrants under the Perishable Agricultural Commodities Act, stating (at 610):

> The Judicial Officer considered all mitigating circumstances in arriving at his decision. Since his order is well within the allowable choice of remedy, we have no right to change the penalty because the agency might have imposed a different one.

In reversing the Secretary's suspension order in this case, the court of appeals improperly substituted its judgment for that of the Secretary with respect to a matter within the latter's discretion. The 20-day suspension of Glover's registration for its wilful violations of the Act was authorized by statute and was perforce an "allowable * * * choice of * * *

remedy" (*Jacob Siegel Co.* v. *Federal Trade Commission, loc. cit. supra*). It cannot be said to bear "no reasonable relation to the unlawful practice[s] found to exist" (*ibid.*) or that it even remotely constitutes a "patent abuse of discretion." *Moog Industries, Inc.* v. *Federal Trade Commission, supra*, at 414.

2. Neither of the grounds upon which the court of appeals relied in setting aside the Secretary's suspension order justified its action.

a. Stating that, in four other cases, the Secretary had issued suspensions for the "dominant purpose" of punishing "intentional and flagrant" violations, the court concluded that the suspension here (where the violations were "wilful," but not "intentional or flagrant") would not achieve uniformity of sanctions for similar violations. But the agency is not required to apply the same sanction in every case, nor is it barred from using more severe but authorized remedies because of leniency in the past. This Court made this clear in *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, where in sustaining the Commission's refusal to renew a radio broadcasting license, it stated (at 227-228):

> Respondent complains that the present case constitutes a departure from the course which the Commission has taken in dealing with misstatements and applications in other cases. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action is too drastic, but we cannot say that the Commision is bound by anything

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appropriate and reasonable with respect to the practice the Department seeks to eliminate". But the authority to determine what constitutes an "appropriate and reasonable" remedy is for the Secretary, not the court.

3. If left standing, the decision of the court of appeals threatens seriously to frustrate the statutory purpose of providing effective protection to both sellers and buyers of livestock and the general public. Registrants under the Packers and Stockyards Act would be less likely to comply with the Act's prohibitions against improper practices if there were a significant possibility that the penalty imposed by the Secretary for violations would be judicially revised.* Further, the decision appears equally applicable to many other regulatory statutes which authorize the suspension of registrants or licensees. See, *e.g.*, the Perishable Agriculture Commodities Act, 7 U.S.C. 499h; the Commodity Exchange Act, 7 U.S.C. 8(a); the Tariff Act of 1930, 19 U.S.C. 1641(b);

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*The necessity for an effective deterrent against violations of the Act is shown by a report of the Department of Agriculture to Congress in 1969 which indicated that false weighing alone results in losses to livestock producers of approximately $15 million annually. Congress was further told that false weighing had been found at 19.4 percent of the markets and buying stations investigated in 1968, including 14.4 percent of the facilities examined on a "routine, spot check basis without any reason to suspect false weighing." Hearings before a Subcommittee of the House Committee on Appropriations, "Department of Agriculture Appropriations For 1970", Part 3, 91st Cong., 1st Sess., p. 19. The implications of the decision below, of course, are not restricted to this particular type of violation.

the Securities Exchange Act of 1934, 15 U.S.C. 78o (b)(5); and the Communications Act of 1934, 47 U.S.C. 303(m)(1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM KANTER,
Attorneys.

MAY 1972.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 71-1092

GLOVER LIVESTOCK COMMISSION COMPANY, INC., PETITIONER

vs.

CLIFFORD M. HARDIN, Secretary of Agriculture, and THE UNITED STATES OF AMERICA, RESPONDENTS

On Petition to Review an Order of The Secretary of Agriculture

January 26, 1972

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

Glover Livestock Commission Company, Inc. (Glover) petitions this Court for review of a decision and order of the Judicial Officer of the United States Department of Agriculture. The Judicial Officer held that Glover violated 7 U.S.C. § § 208 and 213 of The Packers and Stockyards Act,[1] and ordered it to cease

[1] 7 U.S.C. § 208. Unreasonable or discriminatory practices generally.

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to

and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors or livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

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the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

7 U.S.C. § 213. Prevention of unfair, discriminatory, or deceptive practices.

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.

The Judicial Officer also suspended Glover as a registrant under the act for 20 days.

The scope of our review is limited to the correction of errors of law and to an examination of the sufficiency of the evidence supporting the factual conclusions. The findings and order of the Judicial Officer must be sustained if not contrary to law and if supported by substantial evidence. Also, this Court may not substitute its judgment for that of the Judicial Officer's as to which of the various inferences may be drawn from the evidence. *Fairbank* v. *Hardin*, 429 F.2d 264 (CA 9 1970); *Swift & Co.* v. *United States*, 393 F.2d 247 (CA 7 1968) and *Capitol Packing Co.* v. *United States*, 350 F.2d 67 (CA 10 1965). Further, the Packers and Stockyards Act is remedial legislation and must be liberally construed in order to further its life and fully effectuate its public purpose to prevent economic harm to producers and consumers at the expense of middlemen. *Bruhn's Freezer Meats* v. *USDA*, 438 F.2d 1332 (CA 8 1971) and *Swift & Co.* v. *United States*, *supra*, at 253.

Glover is an operator of a "posted stockyard" in Pine Bluff, Arkansas and is registered under the Act to sell livestock on commission as a registered market agency. On or about June 2, 1964, July 26, 1966 and June 20, 1967, representatives of the USDA conducted investigations of Glover's operations under the act. On each date, the representatives reweighed several drafts of consigned livestock that Glover had weighed for sale on a weight basis at the stockyard. The reweighing apparently disclosed that the drafts had been weighed at less than their true and correct weights. On August 4, 1966 and again on June 26, 1967, Glover was notified of the check-weighing results and was requested to institute corrective action

which would assure accurate weighing at the stockyard.

Glover held a livestock auction at its stockyard from 1:30-4:30 p.m. on February 25, 1969. In attendance were two USDA representatives; one a livestock marketing specialist and the other a scales and weighing technician. Following completion [*sic*] of the sale, they selected 29 head of cattle for reweighing in 28 drafts.[2] Reweighed on Glover's scales, nine of the cattle had gained a total of 75 pounds, ten weighed the same as that shown on the weighmaster's scale tickets and nine had lost weight.[3]

As a result of this investigation, on May 12, 1969, the Administrator of the Packers and Stockyards Administration instituted these proceedings before the Secretary of Agriculture charging violations of 7 U.S.C. §§ 208, 213(a) and 221, and 9 CFR §§ 201.43(a), 201.55 and 201.71 (1971).

Sufficiency of the Evidence

Glover contends that the Judicial Officer's finding that Glover weighed livestock at less than their true and accurate weights is not supported by substantial evidence.

Roy Glover, president of petitioner, testified with support from others that the cattle reweighed could have gone through the auction ring at any time from 1:30 to 4:30 p.m. on February 25, 1969; that it is

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[2] Apparently one cow and her calf were weighed together in one "draft."

[3] The Judicial Officer noted in his findings of fact that when livestock are reweighed after an interval of time in which no food or water is available, they can be expected to show a weight loss.

normal procedure to stop the auction periodically and move cattle from one pen to another; and that some of Glover's pens contained food and water while others did not. Glover contends that this evidence "preponderates towards the finding" that the cattle that gained weight had been given food and water sometime during the three-hour auction, and that this explanation is more feasible than the Department's argument that the cattle were deliberately or carelessly short-weighed.

The Department's evidence was that immediately following the auction the two specialists introduced themselves and announced the purpose of their visit. Endeavoring to select cattle which had been yarded only in dry pens, Baird, a scales and weight technician who has conducted almost 350 check-weighing investigations such as this, was informed by Roy Glover that the cattle to be reweighed were presently penned where they were sold. Baird checked each of the pens from which the cattle were to be taken and, discovering no food or water present, proceeded to reweigh the 28 drafts.[4]

Given that cattle will tend to lose weight when they are penned without access to food and water, and assuming that the scales utilized for the weighing and reweighing are accurate(as will be discussed below), the evidence as presented would obviously allow for either of two conclusions. Either the cattle tested that had gained weight actually had access to food and water subsequent to their weighing and prior to their

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[4] Although the USDA scales and weighing technician endeavored to reweigh cattle only from "dry pens," he inadvertently reweighed five who were taken from a pen in which water was available. The five head, however, showed a total weight *loss* of 20 pounds on reweighing.

reweighing or they were weighed at less than their true and accurate weight. As already mentioned, this Court will not substitute its judgment for that of the fact finder where the facts will support various but opposing inferences. The Hearing Examiner and not this Court, had the opportunity to observe the demeanor of the witnesses. The cattle tested were initially weighed at most less than two hours before the reweighing began, a fact which limits the amount of time the cattle could possibly have had access to food and water. Additionally, we note that while discussing the weight discrepancies upon completion of the reweighing with Baird, neither Glover nor his weighmaster, Leonard, offered any explanation or information. We further note that Leonard, the one person in a position to contradict the Department's evidence, was not called by Glover to testify. See *Adamson* v. *California*, 32 U.S. 46, 60-61 (concurring opinion of J. Frankfurter 1947); *Milbank Mut. Ins. Co.* v. *Wentz*, 352 F.2d 592, 597 (CA 8 1965) and *Illinois Central R.R. Co.* v. *Staples*, 272 F.2d 829, 834 (CA 8 1959). All evidence considered, the Hearing Examiner, crediting the evidence to the effect that the cattle reweighed had had no access to food and water, could properly conclude that they had been under-weighed by Glover. Such a finding would be neither "hopelessly incredible or flatly contradict either a 'law of nature' or undisputed documentary evidence." *Fairbank* v. *Hardin*, *supra*, at 268.

Glover also contends that the weight discrepancies were caused by a malfunctioning of the scales utilized at the stockyards. Glover, who leases the stockyard facilities including the scales from an unrelated corporation, claims that contrary to the Department's evidence showing the scales were accurate, it conclusively established they were not.

On June 6, 1969, almost three and one-half months after the investigation, it accidentally learned the scales might be inaccurate. On June 9, a private scales firm authorized by the USDA to conduct livestock scale tests determined that the scales would print one or two graduations off if the ticket printing handle was slammed too hard. As a result of this report Glover caused the lessor of the stockyards to install a new scale in October. Fred G. Wagner, a field sales engineer for the firm installing the new scales, was asked by Glover to inspect the old one being replaced. Wagner testified that several internal components were worn and rusted, a result of a lack of maintenance which should have occurred over a period of time. His conclusion was that as a result of these defects, cattle running on and off the scale could cause such a thrust or shock that the scale would measure inaccurately; that at times the thrust of cattle running onto the scale could be exactly counterbalanced by the thrust of cattle departing, causing the scale to be properly balanced when not in use, and that at times the scale would also measure accurately. Wagner also testified that the scale testing procedure normally followed, placing weights upon the corners of the scale platform, would not necessarily have detected the distortions he described.

Between May 27, 1964 and February 25, 1969, some 13 scale tests were conducted and each time Glover's scales were deemed accurate and capable of correctly weighing livestock. Twice during this period Glover was notified by the USDA that investigation disclosed they had been short-weighting cattle and was requested to take immediate corrective action. The record discloses Glover did not question the accuracy of the scale until these proceedings were instituted. Furthermore, the report Glover cites dated

June 16, 1969, also concluded that the scale would "operate properly if not abused in stamping the ticket." Indeed, Wagner, whose expertise admittedly did not include scale testing and was in fact not testing Glover's scale for accuracy on the day he inspected it, acknowledged that livestock scales with a comparable degree of wear are capable of weighing accurately.

The USDA scales and weighing specialist, Baird, testified that immediately prior to the reweighing he inspected the scale and ascertained that the deck was moving freely and not wedged in any rigid position. During the weighing process he intermittently checked to see that the scale held its proper balance. Six days later Baird returned with an officer of the Arkansas Plant Board and conducted a physical examination of the deck and scale pit, a balance test and a distributed load test, concluding that the scale was performing properly.

Clearly, there was substantial evidence supporting the Judicial Officer's finding that Glover's scale was an accurate weighing instrument. We also conclude that there was substantial evidence supporting the Judicial Officer's findings that Glover violated the Act by short-weighing cattle. Glover, when it accepts cattle for sale on consignment, must operate its business as a fiduciary[6] and the Act clearly placed upon it a duty to safeguard farmers and ranchers against re-

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[6] *United States* v. *Donahue Bros., Inc.*, 59 F.2d 1019 (CA 8 1932) and *Midwest Farmers, Inc.* v. *United States*, 64 F. Supp. 91 (D. Minn., three-judge court 1945). The weight imprinted upon the scale ticket by the market agency's weighmaster determines the amount paid by the buyer. In this light, Glover occupies a unique position of trust with respect to both the buyer and seller of livestock. Its sole objective should be to obtain the highest price obtainable under open and competitive market conditions.

ceiving less than the true market value of their livestock. *Bruhn's Freezer Meats* v. *USDA*, *supra*, at 1337. Having failed in its duty, the order to Glover to cease and desist from such practices was clearly appropriate.

Suspension of Registration

In addition to the cease and desist order, the Judicial Officer also suspended Glover as a registrant under the Act for 20 days although staying his order pending the outcome of this appeal. He stated,

> It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by complainant and the hearing examiner. (The Hearing Examiner recommended a 30-day suspension.)

Glover strongly resists the suspension upon two grounds: that the suspension was in excess of the Department's statutory authority; and that the sanction imposed bears no reasonable relationship to the violation alleged and constitutes an arbitrary and discriminatory administration of the Act.

The suspension was within the Secretary's authority. 7 U.S.C. § 204 provides for the suspension of any registrant found in violation of the Act. The Administrative Procedure Act, however, provides that:

> 5 U.S.C. § 558 Imposition of Sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses --

(a) * * *
(b) * * *
(c) * * * Except in cases of wilfulness . . ., the withdrawal, suspension, revocation, or annulment of a license is lawful only, if before the institution of agency proceedings therefore, the licensee has been given——

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and
(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

* * *

Although gross neglect or acts done with careless disregard of statutory requirements may constitute a *willful* violation of the Act, see *Capitol Packing Company* v. *United States*, 350 F.2d 67, 78-79 (CA 10 1965), *Goodman* v. *Benson*, 286 F.2d 896, 900 (CA 7 1961) and *Eastern Produce Co.* v. *Benson*, 278 F.2d 606, 609 (CA 3 1960), we believe such a finding unnecessary here. Glover was given notice of its short-weighing violations in 1966 and again in 1967. Each time it was requested to comply with the Act. Glover clearly had notice of its violations and opportunity to cease such activities. See *H. P. Lambert Co.* v. *Secretary of Treasury*, 354 F.2d 819, 821 (CA 1 1965).

Glover urges this Court to exercise its 28 USC § 2106* authority to modify the order of suspension.

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*28 USC § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry

> that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

See also *Federal Trade Commission* v. *Universal-Rundle Corp.*, *supra* at 251.

Other courts of appeals have recognized that an otherwise permissible penalty is not invalid because it may be more severe than those imposed in other cases. In *G. H. Miller & Co.* v. *United States*, *supra*, where the Secretary had revoked a license, the Seventh Circuit summarily rejected an argument based upon asserted non-uniform application of sanctions, stating (260 F. 2d at 296):

> The petitioner * * * insist that the penalty here is more severe than any penalty imposed upon any other violator of the Act and cite cases where a lesser penalty was affixed. We are not impressed by such a specious argument.

In *Hiller* v. *Securities and Exchange Commission*, 429 F. 2d 856, 858-859, the Second Circuit similarly rejected the argument:

> * * * Comparison of sanctions in other cases is foreclosed, however, by our decision in Dlugash v. Securities and Exchange Commission, 373 F. 2d 107 (2nd Cir. 1967). There petitioners complained that other parties in the same proceeding suffered disproportionately less severe penalties. We concluded that, even if the penalties were disproportionate, "it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion." *A fortiori*, we cannot disturb the sanctions ordered

in one case because they were different from those imposed in an entirely different proceeding. "[F]ailing a gross abuse of discretion, the courts should not attempt to substitute their untutored views as to what sanctions will best accord with the regulatory powers of the Commission. * * *" Tager v. Securities and Exchange Comm'n, 344 F. 2d 5, 8-9 (2d Cir. 1965).

In any event, the administrative decisions on which the court of appeals relied do not establish that the Secretary has imposed suspensions only for intentional and flagrant violations; at most, those decisions merely show that the violations there were of that character.[6]

b. The court also concluded that the "cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem

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[6] In the principal administrative decision upon which the court relied, *In re Milton Silver*, 21 A.D. 1438, the Secretary held that "[f]alse and incorrect weighing of livestock by registrants under the act is a flagrant and serious violation thereof. * * * [E]ven if respondent did not give instructions for the false weighings, his *negligence* in allowing the false weighings over an extended period brings such situation within the reach of the cited cases [sustaining sanctions] and we would still order the sanctions below" (21 A.D. at 1452, emphasis added).

Moreover, according to data provided by the Department of Agriculture, since 1950 the agency has issued approximately 150 cease-and-desist orders against market agencies for improper weighing under the Act. In all but 2 of those cases the Secretary also ordered suspensions ranging from one week to five years. Those figures illustrate the unfounded nature of the court's assumptions concerning the agency's practice.

APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P&S DOCKET NO. 4156

In re

GLOVER LIVESTOCK COMMISSION COMPANY, INC.,
RESPONDENT

DECISION AND ORDER

Preliminary Statement

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U.S.C. 181 *et seq.*). It was instituted by a complaint filed by the Packers and Stockyards Administration, United States Department of Agriculture. The respondent, operator of a stockyard at Pine Bluff, Arkansas, and registered under the act to sell livestock on commission, was charged with weighing and selling livestock at less than true and correct weights and with failing to keep correct records. The respondent filed an answer denying the alleged violations and requesting a hearing.

After several continuances, a hearing was held in Pine Bluff, Arkansas, on January 28 and 29, 1970, before Chief Hearing Examiner Jack W. Bain, Officer of Hearing Examiners, United States Department of Agriculture. R. A. Eilbott, Jr., and Edward W. Staten of Reinberger, Eilbott, Smith & Staten, Pine Bluff, Arkansas, appeared for the respondent. James S. Kryzminski and John M. Powell, Office of the General Counsel, United States Department of Agriculture, appeared for complainant.

After the hearing, the parties filed proposed findings and briefs. The hearing examiner issued a recommended decision to the effect that the respondent had violated the act as charged in the complaint and he proposed a cease and desist order, a record-keeping order and the suspension of the respondent as a registrant under the act for a period of 30 days. The respondent filed exceptions and oral argument upon the exceptions was held in Washington, D.C., before Judicial Officer Thomas J. Flavin on December 2, 1970.

Findings of Fact

1. The respondent, Glover Livestock Commission Company, Inc., is a corporation operating a stockyard at Pine Bluff, Arkansas, posted as a stockyard under the act, selling livestock on commission at the stockyard, and registered under the act as a market agency to sell livestock in interstate commerce.

2. By letter dated August 4, 1966, respondent was notified that on June 2, 1964, and July 26, 1966, investigations had disclosed that an employee of respondent had weighed consigned livestock for sale on a weight basis at less than their true weights, and respondent was requested to take action to assure accurate weighing in compliance with the act and the regulations.

3. By certified letter dated June 26, 1967, respondent was notified that similar short weights had been made by respondent, and respondent was again requested to take corrective action.

4. At all times material herein there was a scale at respondent's stockyard which was used to weigh livestock for sale on a weight basis. This scale was manufactured by Fairbanks-Morse Scale Company,

had a 20,000-pound capacity, and was equipped with a type-registering weigh beam having five-pound minimum graduations (CX 6).

5. On February 25, 1969, Kenneth F. Grizzell, Supervisor of the Memphis Area Office of the Packers and Stockyards Administration, and Ben D. Baird, Livestock Scales and Weighing Specialist assigned to said Memphis Area Office, visited respondent's stockyard for the purpose of reinvestigating respondent's weighing parctices. At approximately 3:15 p.m., Mr. Grizzell entered respondent's auction sales arena. He observed the selling of livestock for approximately one hour, but he was unable to observe the weighing of livestock during that time due to the location of the scale house outside of the sales arena. The sale appeared to be over at approximately 4:30 p.m., and Mr. Grizzell left the sales arena to get Mr. Baird who had remained in his automobile. Grizzell and Baird then went to the stockyard scale house and informed respondent's weighmaster, Cecil Leonard, that they wished to reweigh some livestock for check-weighing purposes. Baird then informed Roy Glover, manager of the stockyard, of the purpose of the visit, and Glover assisted Baird in getting livestock out of the pens for reweighing. Twenty-eight drafts of livestock were selected for reweighing. Of these, 27 were single head drafts, and one draft consisted of a cow and a calf. The results of the check weighing showed that nine of the drafts of livestock appeared to gain weight over their sales weights, 10 drafts showed no change in weight and nine drafts showed a weight loss when their check weights were compared with their sales weights (CX 4A; Tr. 17-18, 108) as follows:

No. Head	Buyer	Seller	Sales Weight (Lbs.)	Check Weight (Lbs.)	Gain + Loss — (Lbs.)
1	S. V. Hunt	E.E. Silliman	300	305	+5
1	"	J. A. McFarlin	335	350	+15
1	"	Sammy Conners	310	310	0
1	"	Bobby Whithead	255	265	+10
1	"	Boyd Pledger	345	345	0
Balance Zero 5:05 P.M.					
1	(Tom) Southwest Cattle Co.	W. R. Hamilton	410	410	0
1	"	O. Wolfe 2	370	380	+10
1	"	J. V. McPherson	435	435	0
1	"	E. Graves	380	390	+10
1	"	Southwest Cattle Co.	365	370	+5
1	"	M. N. Williams	365	370	+5
1	"	Henry Williams	360	365	+5
Balance Zero 5:12 P.M.					
1	Southwest Cattle Co. # 33	Southwest Cattle Co.	245	255	+10
1	" # 45	W. R. Hamilton	460	460	0
1	" # 30	John Rust Foundation	310	305	—5
1	" # 31X	"	265	260	—5
1	" # 37	Martindale Brothers	330	330	0
1	" # 33	W. R. Hawkins	290	290	0
1	" # 30	Jr. Mitchell	265	265	0

No. Head	Buyer	Seller	Sales Weight (Lbs.)	Check Weight (Lbs.)	Gain + Loss — (Lbs.)
Balance Zero 5:21 P.M.					
1	Southwest Cattle Co. (Armour)	Benny Ridgeway	1110	1100	—10
1	"	Tom Slaughter	870	855	—15
1	"	"	775	770	—5
1	"	"	820	820	0
1	"	"	310	305	—5
1	"				
Balance 5:29 P.M. Zero					
1	Blant Jones	O. L. Henderson	660	650	—10
2	"	Fred Curry	765	760	—5
1	"	Ed Reep	390	390	0
1	"	E. E. Silliman	380	375	—5
Balance Zero 5:34 P.M.					

6. When livestock which have been weighed for sale are reweighed after an interval of time, during which time interval the livestock do not receive feed or water, the livestock are normally expected to show a weight loss upon reweighing. Such weight loss is due to the shrinkage normally expected to occur when animals do not partake of feed or water over a period of time (Tr. 31, 98-99, 124-26).

7. Except for five head of livestock taken from pen 30, the drafts of livestock referred to in Finding of Fact 5 did not have access to feed or water during the interval between the time when they had been weighed by respondent for purposes of sale and the time when they were reweighed by respondent's weighmaster, Mr. Leonard, during the course of the investigation. Pen 30 contained water in a trough. However, the five head of livestock in pen 30 showed a total weight loss of 20 pounds upon reweighing (Tr. 110, 123-26, 349-51).

8. On March 3, 1969, Mr. Baird, along with Mr. Roberts, an employee of the Arkansas State Plant Board, Little Rock, Arkansas, tested respondent's livestock scale for accuracy. The scale was found to be within tolerance and was determined to be a reliable instrument for weighing livestock (CX 6; Tr. 112-13, 120-21).

9. The value of livestock sold through respondent's stockyard is determined by the price per hundredweight. Buyers are aware of and compare the shrink which they receive at various markets. Weighing livestock at less than the true and correct weight favors the buyer, in that the livestock would not show the amount of shrinkage that they would have shown if weighed accurately at the time of sale. In addition,

most sellers do not weigh their livestock before bringing them to market (CX 4D; Tr. 45, 72, 97).

10. On December 2, 1963, and again on September 14, 1967, respondent's weighmaster executed a "Weighers Acknowledgement and Agreement" in which he agreed to comply with the "Instructions for Weighing Livestock" issued by the Packers and Stockyards Administration. In addition, an abbreviated version of the "Instructions for Weighing Livestock" is posted in the respondent's scalehouse (CX 5A, 5B, 5C, 5D; Tr. 46-50). The instructions prescribe that livestock shall be weighed accurately to the nearest minimum graduation.

Conclusions

The results of the test reweighs by complainant's representatives are not in controversy, that is to say, nine drafts weighed more on the test reweighs than the weights at which the livestock was previously sold by respondent.

During the proceeding here respondent advanced several reasons for the gains in weight. Respondent claims that between the sales weighings and the test reweighs the animals involved had been moved from pen to pen and had water and feed available. Complainant's representatives testified that the pens from which the animals were selected for test reweighs did not contain feed or water, except for one pen containing water the livestock from which weighed less upon reweigh than at the time of sale. (Finding of Fact 7).

The complainant's representatives also testified that when they showed the results of the test reweighs to respondent's manager Roy Glover he offered no explanation of the weight gains. The hearing examiner who saw and heard the witnesses testify rejected the

claim of respondent that the livestock reweighed had access to feed and water between the weighing and reweighing.

Respondent also defends on the ground that the scale could have sporadically weighed inaccurately. This position is based largely upon testimony of Mr. Frank Wagner, a sales representative for Fairbanks-Morse Scale Company, who dismantled the scale involved in October 1969, *about eight months after* the transactions in issue. Mr. Wagner found some of the parts worn but did not test the scale for accuracy. He testified too upon cross-examination that he had seen scales of the type used exhibiting a similar degree of wear which were able to weigh accurately (Tr. p. 191).

Respondent's scale was found to be an accurate weighing instrument a few days after February 25, 1969, by a representative of complainant and a representative of the Arkansas State Plant Board and was accurate on February 25, 1969.

We conclude then, as did the hearing examiner, that respondent wilfully violated sections 307 and 312(a) of the act (7 U.S.C. 208 and 213(a)) by the incorrect weighings. Weighing livestock at less than its true and correct weight has long been held to be a violation of these sections of the act. See *e.g., In re Roy C. Townsend, d/b/a Madison Stockyards*, 27 A.D. 68 (1968) and the cases cited therein.

Of course the entries by respondent of the false weights upon scale tickets and accounts of sale, copies of which are part of respondent's records constituted a breach of section 401 of the act (7 U.S.C. 221).

It is not a pleasant task to impose sanctions but in view of the previous warnings given respondent we conclude that we should not only issue a cease and

desist order but also a suspension of respondent as a registrant under the act but for a lesser period than recommended by complainant and the hearing examiner.

Order

Respondent, its officers, directors, agents, and employees, directly or through any corporate or other device, in connection with its livestock transactions in commerce, shall cease and desist from:

(1) Weighing livestock at other than their true and correct weights;

(2) Issuing scale tickets or accountings on the basis of false and incorrect weights;

(3) Paying the consignors of livestock on the basis of weights other than the true and correct weights; and

(4) Failing to operate livestock scales owned or controlled by respondent in accordance with the regulations under the act constituting INSTRUCTIONS FOR WEIGHING LIVESTOCK.

Respondent shall keep accounts, records and memoranda which fully and correctly disclose all transactions involved in its business under the act, including among other things, scale tickets, accounts of sale, and buyers' bills, which show the true and correct weights of livestock sold by respondent on a weight basis.

Respondent is suspended as a registrant under the act for 20 days effective March 1, 1971.

Done at Washington, D. C.

February 5, 1971

Thomas J. Flavin
Judicial Officer

APPENDIX C

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1971

NO. 71-1092

GLOVER LIVESTOCK COMMISSION COMPANY, INC., PETITIONER

vs.

CLIFFORD HARDIN, Secretary of Agriculture, and THE UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of Order of the Secretary of Agriculture

This Cause came on to be heard on the petition for review of order of the Secretary of Agriculture dated February 5, 1971, (P.S. Docket No. 4156) the appendix and briefs of the respective parties, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the said Secretary of Agriculture be, and is hereby, affirmed as modified, in accordance with the opinion of this Court this day filed herein.

January 26, 1972

Costs taxed in favor of Respondents in the U. S. Court of Appeals for the 8th Circuit:	
Cost of reproducing Respondents' brief:	$220.78
Total costs of respondents for recovery from Petitioner in the U. S. Court of Appeals for the 8th Circuit.	$220.78

[SEAL]

A true copy.

Attest:

Robert C. Taskes

Clerk, U.S. Court of Appeals, 8th Circuit.
by W. F. Grueninger, Chief Deputy

February 24, 1972

APPENDIX D

STATUTES INVOLVED

The relevant Sections of the Packers and Stockyards Act of 1921, as amended, 7 U.S.C. 181, *et seq.*, provide in pertinent part:

7 U.S.C. 204:

> * * * whenever, after due notice and hearing, the Secretary finds any registrant * * * has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction.

7 U.S.C. 208(a):

> * * * every unjust, unreasonable, or discriminatory * * * practice is prohibited and declared to be unlawful.

* * * *

7 U.S.C. 213(a):

> It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with * * * receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce, of livestock.

Ordinarily it is not for the courts to modify ancillary features of agency orders which are supported by substantial evidence. The shaping of remedies is peculiarly within the special competence of the regulatory agency vested by Congress with authority to deal with these matters, and so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere. 28 USC § 2106 does not allow appellate courts to enter the more spacious domain of public policy which Congress has entrusted in the various regulatory agencies. See *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958); *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941); *Eastern Produce Co.* v. *Benson*, *supra*, at 610; *G. H. Miller & Co.* v. *United States*, 260 F.2d 286 (CA 7 1958) and *Midwest Farmers, Inc.* v. *United States*, *supra*, at 101-102.

The Department refers us to four decisions of the Secretary in which suspensions of registration are imposed for short-weighing consigned cattle. *In re Townsend*, 27 A.D. 68 (1968); *In re Farmers Commission Co., Inc.*, 24 A.D. 1491 (1965); *In re Wayne County Livestock Exchange, Inc.*, 23 A.D. 185 (1964) and *In re Milton Silver*, 21 A.D. 1438 (1962). In all four it was clearly established that the complained of conduct was intentional—in each the respondent had deliberately "back-balanced" or set the scale back behind zero so that it would short-weigh livestock. And it is apparent that the dominant purpose of the sus-

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of such appropriate judgment, decree, order, or require such further proceedings to be had as may be just under the circumstances.

pensions imposed was to punish the various respondents for their intentional and flagrant conduct.

Here to say the least, the evidence indicates that Glover acted with careless disregard of the statutory requirements and thus meets the test of "wilfulness,"[7] but its conduct was not shown to be deliberate or flagrant. Although we fully appreciate the seriousness of the offenses committed by Glover, a suspension would not "achieve . . . uniformity of sanctions for similar violations" (see *In re Milton Silver*, *supra*, at 1452) and it appears to us to be "unwarranted and without justification in fact." *American Power & Light Co.*, *supra*, at 112-113. The cease and desist order coupled with the damaging publicity surrounding these proceedings would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate. Under these circumstances a suspension would be unconscionable. We reverse as to the suspension of Glover as a registrant under the Act.

The Secretary's order is affirmed as modified.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit,

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[7] *Capitol City Packing Co., supra.*

The provisions governing judicial review of this case in the court of appeal, 28 U.S.C. 2341, *et seq.*, provide in pertinent part:

28 U.S.C. 2342:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> * * * *
>
> (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
>
> * * * *
>
> Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. 2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.